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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 WILLIAM DURLING, for themselves and  
4 all others similarly situated, et al.,

5 Plaintiffs,

6 v.

16 Civ. 3592 (CS)

7 DECISION

8 PAPA JOHN'S INTERNATIONAL, INC.,  
9 et al.,

10 Defendants.

11 -----x  
12 United States Courthouse  
13 White Plains, N.Y.  
14 April 11, 2018

15  
16  
17 Before: THE HONORABLE CATHY SEIBEL,  
18 District Judge

19  
20 APPEARANCES

21 FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP  
22 Attorneys for Plaintiffs  
23 JEREMIAH LEE FREI-PEARSON  
24 ANDREW CHARLES WHITE

25 SEYFARTH, SHAW, LLP  
Attorneys for Defendants  
BRENDAN M. SWEENEY

1 THE DEPUTY CLERK: The Honorable Cathy Seibel  
2 presiding.

3 Durling against Papa Johns.

4 THE COURT: Good morning, Mr. Frei-Pearson and  
5 Mr. White.

6 MR. FREI-PEARSON: Good morning, your Honor.

7 MR. WHITE: Good morning, your Honor.

8 THE COURT: And Mr. Sweeney.

9 MR. SWEENEY: Good morning, your Honor.

10 THE COURT: You all can have a seat.

11 As usual, I have many letters: Mr. Maatman's March  
12 20th letter regarding a stay, plaintiff's opposition thereto  
13 dated April 4th, then plaintiff's March 21 letter requesting  
14 leave to amend, and defendant's opposition to that letter dated  
15 April 4th. So there are a lot of moving parts here.

16 There's the third iteration of the motion for  
17 conditional certification, which is not yet fully submitted,  
18 but, based upon what's happened so far, seems to have a better  
19 chance of succeeding than the previous two.

20 Then there's the renewed motion for transfer, which  
21 is also not fully submitted, but also has a better chance of  
22 succeeding than the previous one.

23 And the fact discovery, correct me if I'm wrong, is  
24 coming to a close. Or is that optimistic?

25 MR. FREI-PEARSON: We're getting there, your Honor.

1 It's a little optimistic. I think depositions are going to  
2 stretch into June, and then there would be additional discovery  
3 based on data that would be produced that has not yet been  
4 produced pending resolution of conditional certification.

5 THE COURT: All right. It seemed like at least fact  
6 discovery is scheduled to end by the end of the month.

7 MR. SWEENEY: And just on our side, we've had a few  
8 witness issues just with scheduling, so we just might need a  
9 very small amount of additional time to schedule depositions  
10 that plaintiffs had requested a while ago. So we're just  
11 having some -- but we've now offered dates for all of those.

12 THE COURT: So April 30th might slip, but --

13 MR. SWEENEY: But just a small slip.

14 THE COURT: And that will be the end of fact  
15 discovery, and then the rest is going to be expert discovery?

16 MR. FREI-PEARSON: There will be fact discovery  
17 relating to data that has not yet been produced, and then,  
18 presuming that we're successful in our efforts to conditionally  
19 certify a class, I believe defendants will take discovery  
20 related to opt-ins.

21 THE COURT: All right. There are arguments for what  
22 order all these things should be taken up in. You could argue  
23 that I should decide the motion for conditional certification  
24 and, if I grant it, that's a reason to transfer because it will  
25 be a corporate class. You could argue that I should transfer

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1 because the judge in Kentucky should decide whether there's an  
2 FLSA collective. You could argue I should consider the motion  
3 to amend first because if the new defendants are in, then that  
4 would be an argument against transferring. I don't know what  
5 the right order is, but I have questions.

6 It does seem that plaintiffs, if they were really  
7 interested in bringing in the franchisors who employed  
8 plaintiff Durling, they could have done that two years ago.  
9 The defendant is saying that the sudden interest in bringing --  
10 did I say franchisors? I think I meant franchisees. I know I  
11 meant franchisees. The defendants are arguing that if the  
12 plaintiffs really cared about the franchisees that collectively  
13 operate as PJA Hudson Valley, they've known about them since  
14 before the case was filed and that the sudden desire to add  
15 them is a transparent attempt to avoid transfer. It kind of  
16 looks that way.

17 Why, at this stage of the game, when fact discovery  
18 is coming to an end, should I allow new defendants to be added?

19 MR. FREI-PEARSON: So Mr. Durling has always wanted  
20 to represent his co-workers in a collective against Papa John's  
21 who worked with him in New York. That's been consistent from  
22 day one. Plaintiffs' original theory of the case was that  
23 Mr. Durling could be one of the representatives of a nationwide  
24 collective that would contain those co-workers. We've since  
25 received guidance from your Honor and, almost immediately after

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1 receiving that guidance, we then realized that, under your  
2 Honor's guidance, for Mr. Durling to represent a collective of  
3 his workers, that collective would have to be more narrowly  
4 defined than how we originally pled it, and that's why we  
5 brought in his other employer as a joint defendant.

6 But Mr. Durling has always wanted to bring that  
7 claim. That claim remains live. We would move to  
8 conditionally certify that claim very shortly after your Honor  
9 brought the other -- or gave us leave to amend the complaint so  
10 that Mr. Durling is a potential representative of a collective  
11 that's more narrow than the collective that he represents in  
12 the original complaint. We had -- well, that's the succinct  
13 answer to your Honor's question.

14 THE COURT: Is there a reason why I couldn't certify  
15 the corporate collective that you're looking for, sever those  
16 claims, transfer them to Kentucky, and just keep here the  
17 Hudson Valley case?

18 MR. FREI-PEARSON: Well, that creates some difficulty  
19 with respect to the other named plaintiffs. I think Mr. Morris  
20 represents Delaware, and he would be seeking to certify a  
21 collective of folks who worked for the same franchisee as he  
22 does.

23 THE COURT: That should go to Delaware, one would  
24 argue.

25 MR. SWEENEY: Can I? I'm sorry.

1 THE COURT: Hold your thought.

2 MR. SWEENEY: Okay.

3 THE COURT: You'll get a chance.

4 MR. FREI-PEARSON: So discovery's already been taken  
5 on this case here. It's all the same theory of -- the  
6 underlying merits in this case is exactly the same for the  
7 corporate stores and the franchisee stores.

8 THE COURT: Right, but I'm going to have a case where  
9 I have two or four or six or ten collectives that don't  
10 overlap. I just have never heard of anything like that.

11 MR. FREI-PEARSON: Well --

12 THE COURT: And it also seems burdensome and  
13 inefficient. Obviously, if I sever claims and transfer them to  
14 their home states, so to speak, the parties aren't going to  
15 recommence discovery. They've already taken discovery.

16 I understand why you personally -- I mean, your  
17 office is up the street. You don't want to go to Delaware.  
18 But what sense does it make for a court in New York to be  
19 presiding over a collective made up of plaintiffs and  
20 defendants who are all in Delaware or plaintiffs and defendants  
21 who are all in Illinois when the theory that brought them  
22 together is not flying?

23 MR. FREI-PEARSON: Well, Papa John's itself  
24 transferred one case that was based in Virginia to this court,  
25 and Papa John's sought to transfer another case that was based

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1 in another state.

2 We think, as your Honor said in your original -- or  
3 in the most recent conditional certification motion, whether or  
4 not Papa John's is liable for the actions of these franchisees,  
5 that's a merit determination that your Honor hasn't reached.  
6 What your Honor's decided is that we can't certify a single  
7 nationwide collective, but we absolutely think we can certify  
8 these franchisee collectives. We think the exact same unitary  
9 policy was applied to Mr. Durling and his co-workers, and the  
10 defendant in that case, who's probably going to be the one who  
11 can pay the judgment, is Papa John's, not PJ Hudson Valley, and  
12 so they're already going to be here. And the case against Papa  
13 John's corporate is the same case against the same defendant,  
14 as is the Delaware case, as is the Pennsylvania case.

15 THE COURT: But it's a different theory. The case  
16 against the employees of the corporate stores is corporate had  
17 a policy of underpaying us and we got underpaid. The theory  
18 with the franchisees is going to be different. It's going to  
19 be some sort of joint employer or agency theory. So it's  
20 not -- and -- I don't know what the facts are. I'm not  
21 predicting what I'm going to find. But it's a tougher road to  
22 hoe than you're going to have in the corporate stores. It's  
23 going to be easy to show that Papa John's is responsible for  
24 what went on in the corporate store -- the PJI is responsible  
25 for what went on in the corporate stores. It's a heavier lift

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1 to show that it's responsible for what went on in each of these  
2 franchisees. So it's not the same theory.

3 It may be that, as to the various franchisees, your  
4 theory is the same. I don't know that your facts will be the  
5 same as to each mini collective, which is not to say that any  
6 of this drives the decision, but if I am one of these new  
7 defendants, which I'll call PJ Hudson Valley because you guys  
8 do, I'm going to come in and say, well, it's all very nice that  
9 you guys took discovery, but I wasn't there for that and so I  
10 want to start over.

11 MR. FREI-PEARSON: And so PJ Hudson Valley will make  
12 Mr. Durling available for deposition at the earliest convenient  
13 date they want. We're not going to fight that. And the  
14 discovery that we need from PJ Hudson Valley is very minimal  
15 because we already have the wage records, we already have from  
16 Mr. Durling --

17 THE COURT: Right, but PJ Hudson Valley is entitled  
18 to not only take your clients' deposition, but to get discovery  
19 from PJI. It just seems like a duplication of effort. That's  
20 not the only factor. I understand that.

21 Mr. Sweeney, you were dying to say something.

22 MR. SWEENEY: Yes, your Honor. And I think you're  
23 absolutely right to focus on this issue, but one thing I want  
24 to make sure is clear, the proposed amended complaint has nine  
25 plaintiffs. One has a claim against franchisees. That's



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1 Mr. Durling. Three of them, Morris, Wolff and one other, were  
2 plaintiffs represented by Mr. Frei-Pearson in a 2013 case  
3 against their franchise employer. So the suggestion that the  
4 idea of suing franchisees just came up on your March 1st ruling  
5 really doesn't hold water. They sued and settled. So  
6 Mr. Morris --

7 THE COURT: Well, they thought that Mr. Durling was  
8 going to get to represent the whole country, and now that he's  
9 not going to, they want him to at least represent his  
10 franchisees -- the co-workers at his franchisors -- no, at his  
11 employer's franchises.

12 MR. SWEENEY: My point is their suggestion is take  
13 this nationwide case and graft on the claims of one individual  
14 against one franchisee, because the other ones they already  
15 settled and were paid on.

16 For this PJPA -- this isn't the second bite at the  
17 apple, this is the third bite at the apple, because they  
18 started this in 2013 by suing the franchisee. In 2016, when  
19 they filed the original complaint in this case, it says in  
20 paragraph 17 that Durling worked for a franchisee. They knew  
21 that then. It's not fair to my client to have to now, as you  
22 said, go back and basically restart this case for something  
23 they could have done in 2016. They knew --

24 THE COURT: Well, let me make sure I understand.

25 Durling's the only one who worked for a franchisee.

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1 MR. SWEENEY: No. Sorry. Three others did. But  
2 they sued that franchisee, Mr. Frei-Pearson did, in 2013 in  
3 Pennsylvania. They settled that case in 2015. They released  
4 the franchisee. None of them worked for the franchisee after  
5 that. They worked for these franchisees --

6 THE COURT: That was that giant franchisee? What was  
7 it called?

8 MR. SWEENEY: PJPA.

9 THE COURT: PJPA.

10 MR. SWEENEY: So Mr. Morris worked for PJPA from 2011  
11 to 2013. He released them in 2016. Mr. Morton worked for them  
12 from 2009 to 2013. He released them in 2016.

13 And if you look at the complaint closely, the  
14 Delaware and New Jersey claims and the Pennsylvania claims are  
15 not actually against any franchisee. They're only against my  
16 client, as has always been the case here.

17 So the complaint only asserts claims against  
18 franchisees for Durling, only under New York law. I assume the  
19 plan, then, is to just keep amending and keep adding, which  
20 makes absolutely no sense. They could have done it before.  
21 They can do it in separate cases if they choose. But there's  
22 no reason to graft that onto this case. And, obviously, I  
23 don't think it would stop here. It would have to keep going or  
24 else it doesn't make any sense. And, frankly, it doesn't make  
25 any sense. This case is against my client about the corporate

1 stores. If there was going to be evidence about their  
2 responsibility for a franchisee, it should have been developed  
3 a long time ago. It hasn't been. So this case has its own  
4 history and its own progress. We shouldn't start over. It  
5 could have been done. There's no cause --

6 THE COURT: Well, do they have to start a case  
7 against the franchisee -- no. They were aiming higher. They  
8 were trying to get PJI on the hook --

9 MR. SWEENEY: Right.

10 THE COURT: -- because they doubt the franchisee has  
11 money. Of course, doubting the franchisee has money makes me  
12 question why they want to add these defendants now.

13 MR. SWEENEY: I think it's to avoid transfer.

14 THE COURT: What is your view on whether, even if I  
15 allow them, that would prevent transfer? Why couldn't I take  
16 the big case against the corporate stores and send that to  
17 Kentucky and keep the Hudson Valley case here?

18 MR. SWEENEY: Well, I think, if that happened, that  
19 would be a new case against the Hudson Valley defendants. They  
20 have every right to have it be a new case. I'm, obviously, not  
21 representing them, but I think that's --

22 THE COURT: Well, you represent PJI.

23 MR. SWEENEY: Right.

24 THE COURT: Is that something they would want to see  
25 or not want to see?

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1 MR. SWEENEY: What they don't want to see is a case  
2 in which they have to have co-defendants who are franchisees in  
3 the same case that's been litigated for two years. What  
4 happens otherwise -- the truth is these franchisees have been  
5 sued by Mr. Frei-Pearson and his co-counsel for years.  
6 Mr. Potashnick, who's counsel in this case, has eleven cases  
7 pending currently just against Papa John's franchisees. So  
8 they sue these franchisees all the time all over the place. I  
9 don't understand why they would need to be added to this case.

10 THE COURT: Did they ever win?

11 MR. SWEENEY: I'm sorry?

12 THE COURT: Did they ever win?

13 MR. SWEENEY: They settled some. I honestly don't  
14 know. I don't represent any of the franchisees. But they know  
15 how to sue franchisees. They've known since well before 2013.  
16 They've sued them for years and years and years.

17 This case is different. This case is against the  
18 franchisor and its progressed a long way. And your comments  
19 about, you know, your decision not being a decision on the  
20 merits certainly makes sense, but that's this case, and that  
21 should be litigated in this case against this defendant that's  
22 been the sole defendant for two years. There's no reason, no  
23 cause, to reset this case and start it over.

24 THE COURT: What about the plaintiffs and claims that  
25 the plaintiffs want to add? They want to add new named

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1 plaintiffs so that they can bring in state law claims from  
2 three other states where opt-ins worked and they want to add  
3 the plaintiff in the Achoual case.

4 MR. SWEENEY: This case is a case against my client  
5 and somebody like Colonel's, Limited, who we acknowledge is  
6 affiliated. I certainly can see -- obviously, we're going to  
7 reserve all our rights to respond to that complaint because we  
8 may have defenses individually, but I could certainly  
9 understand that.

10 The thing we have a concern with is adding these new  
11 defendants and this new franchisee theory. This case should be  
12 about corporate stores and the corporate defendant, and if your  
13 Honor were to allow that, we would understand that, but that  
14 doesn't really change the core of the case. What changes the  
15 core of the case is adding these franchisees that could have  
16 been added two years ago.

17 THE COURT: And your theory as to why I should stay  
18 is what?

19 MR. SWEENEY: It really goes to your first point  
20 about the order in which things should be decided. My opinion  
21 is the case should go to Kentucky. The judge in Kentucky --  
22 and, of course, we're happy with your rulings so far, but we  
23 just think that's the appropriate place for the case and the  
24 judge in Kentucky should decide the rest of the issues in the  
25 case. So, really, it's more about the order of issues.

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1           We've continued to work on discovery. We understand  
2           there's depositions that are going to happen. But we don't  
3           think that major decisions in the case should keep being made  
4           until the transfer issue is made. So, really, our request is  
5           more to the order of issues.

6           THE COURT: But the clock is ticking. Are you  
7           willing to toll the statute for the period of the stay?

8           MR. SWEENEY: I would need to consult with my client,  
9           but I think we would.

10          THE COURT: Well --

11          MR. SWEENEY: The core issue to us is really the  
12          amendment in adding this franchisee theory in. That's the  
13          central issue to us. And, obviously, the transfer issue, but  
14          that stands on its own to a certain extent.

15          THE COURT: Well, I'm not going to shoot from the hip  
16          on something with this many moving parts. And I don't know  
17          what arguments either side will have either on the motion for  
18          conditional certification or the motion to amend. I guess I  
19          have some idea on the motion to transfer. But, as I said at  
20          the top, it seems like the motion to certify collective of the  
21          corporate stores has a greater likelihood of success than  
22          before, as does the motion to transfer. And success on either  
23          of those, it seems to me, would have an effect on the motion to  
24          amend because I'm not going to -- ironically, the plaintiff  
25          succeeding on the collective of the corporate-owned stores

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1 makes it almost less sensible to add the franchisee here and  
2 makes it more sensible to have the case against the franchisee  
3 be a standalone case. And, arguably, if I transfer the whole  
4 thing, it shouldn't be my call anyway.

5 I'm not going to stay anything now. I think the  
6 parties should proceed to wrap up their fact discovery. The  
7 two motions that have already been made are going to be fully  
8 submitted soon, but we should probably set a schedule for that.  
9 And I will give further thought to whether I should decide that  
10 first or last. And you guys can put in your papers whatever  
11 arguments you want to make to me about what order you think  
12 makes the most sense.

13 So when would you like to make the motion to amend?

14 MR. FREI-PEARSON: Your Honor, we can have it on file  
15 in a week.

16 THE COURT: Okay. That would be April 18th.

17 How soon can you oppose it, Mr. Sweeney?

18 MR. SWEENEY: If we could have two weeks.

19 THE COURT: That would take us to May 2nd.

20 And reply?

21 MR. FREI-PEARSON: One week, your Honor.

22 THE COURT: May 9th.

23 And I think what would also be helpful, maybe by May  
24 11th if you could each send a letter, no more than three pages,  
25 stating what order you think I should take up the motions and

1 why, and I'll get to them as soon as I can.

2 If you're not going to -- I won't hold you to  
3 anything now, Mr. Sweeney, but if you're not going to oppose  
4 adding the new plaintiffs or the new claims, you could tell  
5 plaintiffs that and save a few trees, but you're, obviously,  
6 under no obligation to do that.

7 All right. It's like a Rubik's Cube, this case.

8 Anything else we should talk about this morning?

9 MR. SWEENEY: Just one thing.

10 When we had originally submitted a letter about the  
11 motion to transfer, we had proposed a briefing schedule. I  
12 don't think it was formally entered.

13 THE COURT: Oh. That was in the same letter, I  
14 think, as your request for a stay.

15 MR. SWEENEY: The first, yes.

16 So the only part that's relevant is the reply on the  
17 18th.

18 THE COURT: Yes. That schedule is fine.

19 MR. SWEENEY: Okay. Thank you.

20 MR. FREI-PEARSON: Your Honor, just one brief point.

21 THE COURT: Yes.

22 MR. FREI-PEARSON: I've tried these cases in  
23 arbitration because it's very hard to get these defendants all  
24 the way to trial. The trial will be very simple when we get  
25 there. I promise your Honor that. I know that procedural



1 stuff is very complicated, but the facts are not.

2 MR. SWEENEY: We strongly disagree and will make it  
3 as complicated as possible.

4 THE COURT: Well, that's why they pay you the big  
5 bucks. But the trial is going to be I delivered 20 pizzas a  
6 night, I drove this many miles, here's what the IRS says the  
7 wear and tear on my car was, here's what I got paid. Right?

8 MR. FREI-PEARSON: That's it.

9 THE COURT: I mean, the interesting part of this case  
10 is not really the merits so much as -- I mean, maybe there are  
11 defenses.

12 MR. SWEENEY: And we certainly disagree that  
13 conditional certification of the corporate store cases even is  
14 appropriate, but we'll save that for our papers.

15 THE COURT: Well, you might have defenses.

16 What's the defense if somebody's getting paid five  
17 bucks for a delivery?

18 MR. SWEENEY: The suggestion that it's all a uniform  
19 policy and a simple equation is wrong. Some of these  
20 plaintiffs, including Mr. Sobol, were paid at least a full  
21 dollar per hour above the minimum wage for some of the time.  
22 So this is a minimum wage case. If he doesn't have a minimum  
23 wage claim, he has no claim. And he was paid, partly because  
24 of a local Louisville ordinance that required my client to pay  
25 him higher, but he was paid well above the FLSA minimum.

1 That's part of the equation here. If the whole expense issue  
2 doesn't drop him below minimum wage, there's no FLSA issue.

3 THE COURT: Well, that's true.

4 MR. SWEENEY: So I think that's a serious issue.

5 THE COURT: That sounds like what the trial would be  
6 about.

7 MR. SWEENEY: Well, we have delivery drivers who were  
8 paid as much as \$12 an hour. Some of them make a tremendous  
9 amount of additional money. And the idea that they're paid  
10 less than minimum wage just doesn't really fly in my opinion.

11 THE COURT: Well, the tips don't get factored into  
12 the minimum wage thing, do they?

13 MR. SWEENEY: Well, they do up to the tip-credit  
14 amount.

15 THE COURT: Right.

16 MR. SWEENEY: But the tip credit plus \$12 an hour for  
17 in-store time. See, they're paid on a dual wage. They're only  
18 paid the tip-credit amount for the time on the road. And some  
19 of these guys are 20 hours in the store, 20 hours out of the  
20 store. Their 20 hours in the store, not always, but often, are  
21 paid well above minimum wage. And what matters is the net for  
22 the week. That's the FLSA analysis.

23 So the idea that the only thing that matters is --  
24 and, also, the idea that there's some uniformity in expenses,  
25 we pay different in every market. We pay different as gas

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1 prices fluctuate. I say pay. I meant we reimburse differently  
2 all over the place. So that's not, to me, something that can  
3 be decided on a class basis. There's a serious class issue  
4 here. And I understand that counsel has been successful in  
5 many delivery driver cases. I don't think this is that case.  
6 This case is different. When you pay a different amount in  
7 each market, it changes things. When you pay different hourly  
8 rates, it changes things.

9 THE COURT: So your theory would be if somebody wants  
10 to -- if somebody's being underpaid at a corporate-owned store,  
11 they have to sue store by store?

12 MR. SWEENEY: No. My theory is that if somebody is  
13 not being underpaid, they don't have an FLSA claim.

14 THE COURT: Well, right, but that's what gets decided  
15 after.

16 MR. SWEENEY: If their net -- well, I don't know,  
17 because when it's so fractured, it's not a uniform policy.  
18 There's not a uniform policy because part -- paying --  
19 reimbursing drivers per delivery, as you said, is not illegal.  
20 It's only illegal if you reimburse too little. And the  
21 reimbursements -- and it's really only illegal if your hourly  
22 rate and your reimbursement put your net wages below the  
23 minimum. That's a complicated equation.

24 THE COURT: Right, but they're alleging all those  
25 things you just said, and whether it's true or not is for

1 another day.

2 MR. SWEENEY: Right. But my point is it's not simply  
3 did you reimburse at the IRS rate. These cases are not --

4 THE COURT: True.

5 MR. SWEENEY: -- that simple.

6 THE COURT: They have to allege that whatever rate  
7 they got reimbursed at was too low and, therefore, it pushed  
8 them below the minimum wage. But if they allege that and they  
9 put in affidavits that say that, whether it's true or not is  
10 not something I decide on a motion for a collective action.

11 MR. SWEENEY: But the hourly rates are objective. We  
12 have records on what they were paid hourly, and if they're  
13 above a certain rate, there's no way you have a minimum wage  
14 violation.

15 THE COURT: Well, if the minimum wage is \$11 and  
16 somebody's getting \$12 an hour irrespective of reimbursement,  
17 then they don't have a minimum wage claim.

18 MR. SWEENEY: And that's some of the people in the  
19 proposed collective. Absolutely, objectively, that is some of  
20 the people in the proposed collective.

21 MR. FREI-PEARSON: May I briefly respond, your Honor?

22 THE COURT: Sure.

23 MR. FREI-PEARSON: These are not new defenses. As  
24 Judge David Baker in Florida said, this is all about simple  
25 math. All of the defenses counsel is reciting were defenses

that were made in Perin v. Papa John's where a collective was certified and then individual Rule 23 classes were certified.

It's simple math. There are some folks who got paid a little bit more than other people. There's some folks who drove a little bit more than other people. But when you do the math on behalf of this collective, the drivers were dramatically underpaid. We're not talking about, you know, a penny. We're talking about massive underpayment.

THE COURT: Well, look, if you have a collective where, when you do the arithmetic, you know, 90 percent of them or 95 percent of them, or 85, a lot of them are going to be entitled to money and some of them aren't. I'm not sure that's a reason not to certify the collective. It's a reason to do the math properly later on. I mean, by certifying the collective, I'm not saying everybody wins. I'm just saying it ought to be litigated together.

It may be that it's not manageable to litigate it together, and that's certainly something you can raise, but if there's a common policy and, in some instances, for whatever corksy reason, there's somebody here or there who was not harmed by that policy in the same way as the rest of the collective, I'm not sure that that's a reason not to certify the collective. That's a reason why, in the long run, that person shouldn't get any money.

MR. SWEENEY: Well, my point is on your 90 percent.

1 There's not a common unlawful policy without the numbers.

2 THE COURT: Well, I made up that number, but, yeah,  
3 obviously, if it was going to be a situation where the  
4 arithmetic was going to be wildly different for everybody and  
5 we were going to have to -- and there was no commonality, then  
6 it wouldn't be appropriate, but if there is a common policy to  
7 which they were subjected and the effect on each of them was  
8 different, you guys will brief for me whether that means I  
9 should or should not certify.

10 MR. FREI-PEARSON: I don't know if your Honor wants  
11 to hear more from me on this.

12 THE COURT: Nothing personal, but no.

13 MR. FREI-PEARSON: I completely understand.

14 MR. SWEENEY: Then I'll take the same direction.

15 THE COURT: I'll look for your papers and your  
16 letters and I'll get to work.

17 MR. SWEENEY: Thank you.

18 MR. FREI-PEARSON: Thank you, your Honor.

19 THE COURT: Thank you.

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